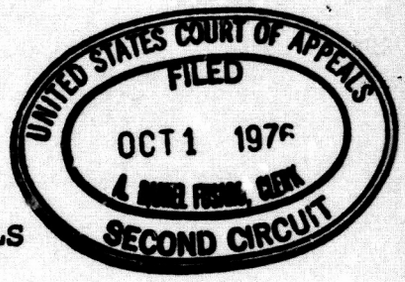
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7376



IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7376

BLANCHE MITCHELL,

Appellant,

B P/S

vs.

NATIONAL BROADCASTING COMPANY and
S. THEODORE NYGREEN, Manager of Information
Services, National Broadcasting Company,

Appellees.

On Appeal From The United States District Court For The
Southern District of New York

BRIEF FOR APPELLANT

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Question Presented

Whether submission of a complaint to a state fair employment agency bars the bringing of an action in federal court, alleging unlawful racial discrimination under 42 U.S.C. §1981.

Statement of The Case

This case of racial discrimination in employment comes here on appeal from an order of the District Court for the Southern District of New York granting defendants' motion for summary judgment and dismissal. This appeal presents an important question concerning the rights of a party aggrieved by acts of racial discrimination to avail herself of a federal remedy which is parallel and supplementary to possible state remedies.

Plaintiff, Blanche Mitchell, is a black female professional. She was hired by defendants to work in their Records Department. On December 4, 1973, plaintiff filed a complaint with the New York State Division of Human Rights. Ms. Mitchell charged that the defendants, particularly Mr. Nygreen, had discriminated against her because of her race. More specifically, defendants had prevented her from advancing in her work by unfounded allegations concerning her competence on the job. A finding of no probable cause was subsequently affirmed by the Appellate Division, First Department, of the Supreme Court of New York.

Plaintiff filed this suit under the Civil Rights Act of 1866, 42 U.S.C. §1981 on November 20, 1975 (A-1)*/, in the

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*/ Numbers in parenthesis preceded by the letter "A" refer to pages of the Appendix to this Court.

District Court, Southern District of New York against defendants National Broadcasting Company and Nygreen. The case was assigned to Judge Charles M. Metzner. The defendants moved to dismiss and for summary judgment on the grounds that the federal suit was barred by the doctrine of res judicata because of the prior state proceedings (A-6, A-53). Defendants' motion was granted and Judge Metzner, by order of July 20, 1976, dismissed the suit (A-91, A-97). On July 29, 1976, plaintiff filed a timely Notice of Appeal (A-98).

Statement of Facts [1]

Ms. Mitchell was hired on March 13, 1972 as an Operations Administrator in the Central Records Department (A-14, A-23). In this position, she was responsible for implementing the regular course-of-business operations of Central Records, i.e., providing records services to the Company (A-23). In addition Ms. Mitchell was to function as understudy and back-up for the Chief Records Administrator, Ruth Preston, with the understanding that she would replace Ms. Preston upon the latter's retirement

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1/ Plaintiff labels this section of the brief "Statement of Facts" with some hesitation because, as appears in the argument section, the record before the Division was never adequately developed. Plaintiff had no control over the development of this record.

in two years (A-14, A-23). Ms. Preston had devised and instituted the systems and procedures used in Central Records. (A-24). These systems and procedures however, had not been reduced to writing and therefore, it was necessary for Ms. Mitchell to learn on the job (A-24).

Ms. Mitchell was the only black professional in her department (A-14). She held a master's degree in Library Science and was given supervisory power over three staff members (A-18). Ms. Mitchell had received excellent recommendations from her former employer, RCA and her initial employment began without incident (A-23). In fact, three months after her appointment, Ms. Mitchell took over operation of the Records Department when Ms. Preston went on her scheduled vacation (A-24). Nothing in the record reveals that she performed below company standards at that time nor that there were any complaints about her work or attitudes (A-24).

In August 1972, Ms. Mitchell was placed on a different floor, separating her from her staff and impairing her ability to supervise them and to observe operations (A-23). Again, however, there were no complaints concerning her work performance. Defendant Noreen became head of

Information Services[2] in December, 1972. Mr. Nygreen reorganized the department and began making critical comments concerning plaintiff's work performance (A-14, A-24). Mr. Nygreen wrote a series of interdepartmental communications in which he either disparaged Ms. Mitchell or solicited complaints about her work.[3]

In spite of Mr. Nygreen's actions, Ms. Mitchell received a 5.9% merit raise on March 25, 1973 (A-24). On April 4, 1973, Mr. Nygreen admitted that Ruth Preston had told him that Ms. Mitchell "was not notably deficient in performing her daily assigned functions (A-24)." There was no record of complaints by any of plaintiff's staff or any other clerks. Ms. Mitchell was placed on four weeks probation on October 17, 1973 and formally dismissed November 16 (A-28). On December 3, Ms. Mitchell filed her complaint with the New York State Division of Human Rights (A-14, 15). The investigator allowed the parties to submit documentary materials and held two conferences at which oral evidence was offered (A-28, A-29). Defendants'

2/ The Records Department is a subdivision of Information Services.

3/ Defendants' memoranda evidence reveals that Nygreen actively set out to build a file on Ms. Mitchell. These memos to Nygreen contain phrases such as "according to your instructions" and "as you asked," evidencing that they were in fact the product of solicitation.

documentary evidence consisted of interdepartmental correspondence to and from the defendants (A-23).[4/]

None of plaintiff's subordinates were interviewed,[5/] (A-23) and there is no record of plaintiff's work having been reviewed[6/] (A-23). Plaintiff was not represented by counsel during these proceedings (A-86).

ARGUMENT

THE DISTRICT COURT ERRED IN APPLYING THE DOCTRINE OF RES JUDICATA TO A SUIT UNDER 42 U.S.C. §1981 BECAUSE OF PRIOR STATE PROCEEDINGS

Both the district court and defendants acknowledge that resort to state proceedings will not bar a subsequent federal action brought under Title VII, 42 U.S.C. §2000e et seq. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, (1975) Voutsis v. Union Carbide Corp., 452 F.2d 889 (2nd Cir. 1971).

4/ At the State Division, other NBC personnel were also charged as defendants.

5/ The field representative's reliance on documents caused the erroneous identification of one of plaintiff's subordinates, Catherine Lim, as an Asian (Apparently because of her last name) when, in fact, she was of Italian descent.

6/ Plaintiff had asked the field representative to review her work rather than rely on representations in memos by defendants.

The district court, however, felt that the considerations important in a Title VII context were not present in a suit under 42 U.S.C. §1981 ("Section 1981). The court reasoned that the mandatory referral provisions of Title VII were incompatible with the notions of res judicata or collateral estoppel. The absence of deferral provisions in Section 1981 were held to open the way for a contrary result.

A. Decisional Law Strongly Supports the Pursuance of Racial Discrimination Claims in Several Forums.

The holding of the district court ignores a long line of precedents concerning the proper relationship between federal rights relating to racial discrimination and proceedings in other forums. The court's ruling would destroy the independence of Title VII and Section 1981 by making access to one (Section 1981) attendant upon proceedings designed to be utilized in the other (Title VII). The Supreme Court has continually refused to recognize such preemption. In Johnson, supra, the court stated:

> We generally conclude, therefore, that the remedies available under Title VII and §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent. 421 U.S. at 461.

This rule that Title VII and Section 1981 create separate and distinct rights has been well established in this and other

circuits:

> Title VII is not irreconcilable conflict with §1981, and does not cover the entire subject matter of that section. If anything, the legislative history of Title VII indicates that it was intended to buttress and supplement §1981 in a specific area rather than to serve as a substitute for §1981 itself. For these reasons we are satisfied that Title VII has neither preempted §1981 nor precluded an independent lawsuit based on a violation of that statute (citations omitted). Gresham v. Chambers, 501 F.2d 687, 691 (2nd Cir. 1974).

See also, Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir. 1971) and Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972) - ("We find unpersuasive the notion that the Congress intended somehow to "preempt" existing rights under §1981 through the enactment of Title VII").

These decisions are keeping with the Congressional mandate to give the statutory scheme against discrimination the "highest priority," Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). In fostering this policy, the Supreme Court has approved the rule that submission of a discrimination claim to one forum does not preclude a later submission to another. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974).

In Wageed v. Schenuit Industries, Inc., 406 F. Supp. 217 (D. Md. 1975) the court addressed the issue of whether the submission of a complaint to the Maryland Commission on Human Rights would bar a later federal suit under Section 1981. The district court, which had held the case sub curia pending decision of the state agency, ruled that res judicata was not applicable:

> "Further, it should be kept well in mind that the independence of federal and state remedies and the reference to the federal remedy as "supplementary" to the state remedy should not be read as indicating that plaintiffs, who first voluntarily pursue state administrative remedies, should be discouraged from and even penalized for so doing.

Similarly, in Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), the court held that res judicata wasnot applicable. In that case, the plaintiff had initially filed with the Connecticut Commission on Human Rights and Opportunities and received a finding of no probable cause. The court's decision was predicated on the inadequacy of the determination made by the state agency. See also, Stevenson v. International Paper Co. 516 F.2d 103 (1975).

The fifth Circuit, in Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (1970) addressed the question of the relationship between the Title VII statutory scheme and Section

1981. In that case, the plaintiff, after utilizing the procedures of Title VII, filed her action in district court 16 days late. The defendants moved to dismiss the complaint for failure to meet the 30-day limitation of Title VII and plaintiff amended her complaint to state jurisdiction under Section 1981. The district court dismissed the complaint and the Circuit Court reversed. The Court reasoned that (1) A right to sue under Section 1981 for private racial discrimination existed prior to 1964 and (2) By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue.

Put another way, the Civil Rights Act of 1866 (from which Section 1981 is derived) created certain rights. It is established that Title VII did not repeal these rights by implication or otherwise. It would, therefore be anomalous to hold that procedures utilized pursuant to Title VII, in state forums, can somehow preempt rights guaranteed in the federal forum.

B. Public Policy Is Against the Application of Res Judicata To Informal Proceedings in Discrimination Cases.

Res judicata is not applied rigidly. Considerations of public policy and justice may cause these rules to be

rejected or qualified. Tipler v. E. I. du Pont de Nemours and Co., 443 F.2d 125 (6th Cir. 1971); 1 B Moore's Federal Practice ¶ 0405[12], at 791. In the instant case, where important questions concerning racial discrimination and federal rights are involved, the federal courts remain the chief arbiters. Even in situations where temporary deferral is required as in Title VII,[7/] the aggrieved party may still vindicate his rights in a federal forum. The policy was well stated in McNeese v. Board of Education, 373 U.S. 368 (1967), where the Supreme Court stated, in discussing 42 U.S.C. Section 1983:

> The purposes were several-fold-to-override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice," and to provide a remedy in the federal courts supplementary to any remedy any State might have. (citations omitted).

Access to the federal court is uniquely important in an employment discrimination case where the discovery assumes a paramount position. See, e.g. Rich v. Martin Marietta Corp., 522 F.2d 333, 342-43 (10th Cir. 1975). The New York State

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7/ In this regard the argument in favor of Section 1981 would appear even stronger than Title VII since local agency deferral is not even required. In order to enforce Title VII rights, the party must first defer to the local agency. Section 1981, which accords no such diference to local proceedings, could hardly be more emasculated by these procedures than would Title VII.

Division of Human Rights is severely circumscribed in its attempts to marshall evidence relating to discrimination and the plaintiffs private attorneys (if indeed he has one) is not allowed to correct any deficiency.[8/] Even if the investigator is desirous of complete discovery, he is hampered by many of the same limitations which the court in Alexander, supra, found to be characteristic of arbitration proceedings and which led to a finding that arbitral decisions would not bar Title VII suits:

> Moreover, the fact finding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. 415 U.S. at 57, 58.

Whether or not res judicata can be applied in theory to

8/ See, e.g. New York State Division of Human Rights v. University of Rochester, 12 E.P.D. ¶11,133 (1976) where the court quashed subpoenas issued by plaintiff's attorney saying:

> If the Division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device. 12 EPD at 5218.

prior state proceedings, the doctrine can be given no effect where the agency determination was inadequate. Hollander, supra. The facts of the "investigation" in the instant case bespeak the inadequacy thereof.

At no time was there a full-scale, formal investigation. The record is fraught with inconsistencies.[9/] Indicative of the scope of inquiry is the fact that the investigator indicated that Ms. Mitchell supervised three employees, "2 Blacks and 1 Asian." The "1 Asian" was, in fact, clearly of Italian descent. The investigator had made his determination based solely on the last name of that employee, Lim.

In addition, the State Division's finding that the defendants had submitted "documentation that controverted substantively the allegations in the complaint" was based solely on inter-departmental memos between the defendants Nygreen and Mayer![10/] The plaintiff's claim was thus decided by the self serving

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9/ The defendants claimed that Ms. Mitchell's staff was near "mutiny". None of these persons was called to give evidence. Similarly, Ms. Mitchell was described as "abusive, bothersome, taunting, argumentative, and uncooperative." Yet, no one was interviewed to substantiate these contentions by defendants. See also, Appeal Board Decision, Dissent: A-23 to A-25.

10/ Vera Mayer, Manager-Library and Records Administration, was a defendant before the State Division.

memoranda of the defendants without one sworn witness and with no opportunity to effectively refute the allegations against her. It is indeed anomalous that an individual's complaint that persons are trying to get rid of her on account of her race should be decided on statements by those same persons, uncorroborated by other evidence that, in their opinion, she should be gotten rid of.

Once having received an adverse determination from the State Division, Ms. Mitchell's fate was sealed for the limited scope of review made it all but certain that the decision would be affirmed.[11/][12/] Even so, the four members of the Appeal Board split 2-2 in voting whether to affirm the Division's decision.[13/] A strong dissenting opinion by Board member Levin pointed out the incompleteness of the record and its failure to resolve several glaring inconsistencies. The dissent indicated that the proper disposition of the case was to remand it to the Division for "further investigation."

11/ Ms. Mitchell was even destined to lose before the Equal Employment Opportunity Commission which reached a finding of no probable cause after according substantial weight to the findings of the New York State Division of Human Rights (A-51). Again, plaintiff was branded with the inadequate record produced by the investigator.

12/ See, e.g. New York State Division of Human Rights v. University of Rochester, supra, at 5218, where the court notes that the "statute provides . . . for the dismissal of a complaint 'in the reviewable discretion' of the Division if it finds that the complaint lacks substance."

13/ Under state law, this equally divided vote required affirmance of the Division's decision.

The defendants have continued to assert that plaintiff Mitchell has had several adjudications on the merits when, in fact, each step following the Division's decision was no more than "rubber stamp" of affirmance. The Appeal Board, for example, cannot reverse a Division order unless it is "arbitrary and capricious," even if the Appeal Board would have come to a different conclusion on the evidence:

> By vacating the Division's order of dismissal, the Board impermissibly exceeded the limited scope of its own review and arbitrarily substituted its own judgment for that of the Division. Long Island Rail Road Co., v. State Division of Human Rights, 346 N.Y.S.2d 849 (App. Div. 1973).

Similarly, the plaintiff found little solace at the Appellate Division. The plight of the plaintiff before the Appellate division is best summarized by this passage from the decision in Mize v. State Division of Human Rights, 349 N.Y.S.2d 364, 367-368 (Ct.App. 1973) where the court said:

> The scope of any such review by the board, however, would have been limited to whether the decision of the commissioner was "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion". (Executive Law, §297-a, subd.7, par. e.) This would seem to contemplate the limited scope of review familiar in article 78 proceedings. Section 298 of the Executive Law provides that in enforcement proceedings in the Appellate Division "[T]he findings of fact on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole." (Emphasis added.) The scope of review in the Appellate Division could scarcely be any broader than that of the appeal board.

See, also, New York Institute of Technology v. State Division of Human Rights, 368 N.Y.S.2d 207 (App.Div. 1975).

Thus, for all practical purposes, the plaintiff's case was decided by the record produced by the investigator, which record was woefully inadequate. This record was the basis for the Division's holding and the last determination which remotely resembled a decision "on the merits." This inability of plaintiff to have her case heard is one of the main reasons for affording discriminatees the right to come to federal court.

While res judicata may be applied to determinations of an administrative agency, it is well worth noting what the Supreme Court had to say on the subject:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. United States v. Utah Construction and Mining Company, 384 U.S 394, 422 (1966)(emphasis added).

Therein lies the key, for plaintiff has never had a "full and fair opportunity to argue [her] version of the facts." Id. at 422.[14/] The avowed purpose of this rule is to avoid "a needless

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14/ The benefit of res judicata (or estoppel) should only be given to those administrative determinations which are the result of proceedings "fully complying with the standards of procedural and substantive due process that attend a valid judgment by a court." Paramount Transport Systems v. Chauffeurs Local 150, 436 F.2d 1064, 1066 (9th Cir.1971); see, United Engineers & Constructors, Inc. v. International Bhd. of Teamsters, 363 F.Supp. 845 (D.N.J. 1973)

duplication of evidentiary hearings." Id. at 420. Defendants, while continuing to use the phrase "adjudication on the merits," somehow ignore the fact that plaintiff has had no formal hearings at all. Further, even had plaintiff received a finding of probable cause, the "merits" would not have been decided until such a hearing had been held.[15/]

C. The Unsettled State of the Law When Plaintiff First Sought Relief Makes the Application of Res Judicata Unjust in This Case.

The district court's reasoning was based in part on the premise that a person who commenced proceedings indicated by Title VII was undoubtedly seeking greater relief than that afforded by Section 1981. This premise is invalid for two reasons. First, it ignores the fact that the aggrieved party normally is referred to the administrative body in the first instance. Secondly, it assumes that the party in the instant case was aware that she had "commenced proceedings pursuant to Title VII."[16/] In regard to the latter, it should be noted that

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15/ Query: Would defendants concede that they had had a full and fair opportunity to litigate if the initial finding had gone against them? See, generally, Waqeed v. Schenuit Industries, Inc. supra, where probable cause was found at the initial stage by Maryland Commission on Human Relations. Even after a three-person tribunal had held subsequent hearings and found that the defendant had not engaged in discrimination, the court still refused to apply res judicata to a suit brought under Section 1981.

16/ The district court is speaking with the benefit of hindsight when it characterizes the initial action taken by plaintiff (A-96) The court is apparently alluding to the fact that the proceedings involved are necessary for Title VII, but may be bypassed for Section 1981. One could hardly be held to have made an election unless one was aware of this fact.

the question of whether one had to utilize administrative procedures before filing a Section 1981 action was not decided by the Supreme Court until 1975 nor by this Circuit until 1974.[17] Johnson v. Railway Express, supra. Gresham v. Chambers, supra. Plaintiff in the instant case initiated her action before the New York State Division of Human Rights on December 4, 1973. This was eight months prior to the decision in Gresham and over sixteen months prior to the Supreme Court's decision in Johnson.[18] The only decision plaintiff had before her was the Voutsis case in 1971 which held that state proceedings would not bar a later Title VII action. Thus, plaintiff was confronted in 1973 with a situation wherein the unsettled state of the law did not provide a definitive answer concerning the need to exhaust administrative remedies prior to action under Section 1981. At the same time, it was clear that a Title VII action, to which one would naturally look for guidance in employment

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17/ If plaintiff had bypassed the state procedures and the question had been decided differently, she would now be in the converse position. Rather than defendants asserting that she could not bring her suit because of her resort to state proceedings, they would be asserting that she could not bring her suit because of her failure to resort to state proceedings first.

18/ It should also be noted that the Division's finding was rendered in February, 1974, the Appeal Board's decision in July and the Appellate Division's decision in November. All of these proceedings were prior to Johnson.

suits, was not barred by prior state proceedings. Plaintiff would have had to predict the result in Gresham and Johnson, as well as in the instant case,[19] in order to be aware of the pitfalls ahead of her. Plaintiff-appellant submits that it would be inequitable and inimical to the policy favoring the redress of racial discrimination to charge plaintiff with this knowledge.[20]

D. Application of Res Judicata Conflicts With Congressional Policy and Interests of Judicial Economy

The person who has been the object of racial discrimination is seeking to have his problem resolved as quickly as possible. In this regard it should be noted that a premature lawsuit may have deleterious effects on this objective:

19/ Even had the plaintiff foreseen the result in Gresham, there was no indication that resort to the administrative remedy, though not necessary, would bar a later Section 1981 action.

20/ See, generally, England v. Louisiana State Board of Medical Examiners, 375 U.S.411 (1964). In that case, plaintiffs had submitted their federal claim to the state court in the belief that such action was mandated by a prior Supreme Court decision. After decision by the Louisiana Supreme Court, plaintiffs sought to bring suit in federal district court, but the complaint was dismissed on the ground that the state courts had passed on all the issues. The Supreme Court held that plaintiffs' action was unnecessary but declined to hold them bound by the state determination:

> [W]e are unwilling to apply the rule against these appellants . . . [T]heir primary reason for litigating their federal claims in the state courts was assertedly a view that Windsor required them to do so. 375 U.S. at 422

> Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of indious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. Johnson, supra, at 461.

Congressional policy, as embodied in Title VII, favors this conciliation route. The district court's holding sets up an irreconcilable conflict whereby an aggrieved party who avails himself of the informal agency mechanism[21/] finds that he has foreclosed resort to the Section 1981 federal remedies. The district court's holding thus undermines the policy favoring informal resolution of complaints.

The district court predicated its decision on the supposition that the person who has commenced Title VII proceedings is "aiming for greater relief than afforded by Section 1981." This premise, attributing to a party who commences state proceedings "obvious" intentions regarding

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21/ While these remedies need not be resorted to before filing an action under Section 1981, this Curcuit's holdings in the context of 42 U.S.C. §1983 (a parallel civil rights statute) indicates a preference for prior exhaustion of administrative remedies. Plano v. Baker, 504 F.2d 595, 597 (2nd Cir. 1974); Eisen v. Eastman, 421 F.2d 560 (2nd Cir. 1969) cert. denied, 400 U.S. 841 (1970).

Title VII or Section 1981, is contrary to the actual dynamics of employment complaints. In practice, the state proceedings are but a necessary expedient[22/] to insure that some action is taken as soon as possible.

The situation is critical at this stage. The aggrieved party, acting usually without counsel, is unprepared to begin a formal suit and so files with the state agency to resolve his complaint lest some period of limitations passes to bar his action. The procedures are informal, private counsel is not needed and the agency has considerable experience and expertise in the areas. These factors make the agency route particularly desirable to the layman. The individual is unaware of every option in redressing the discrimination to which he has been subjected. Yet, the district court would attribute to such an individual, an election between Title VII and Section 1981.

Even assuming arguendo that the aggrieved party was aware of the election problem, the difficulty is not alleviated. If the party does not want his Section 1981 suit barred, he must somehow preserve that cause of action. The Court, however, did not indicate how this might be done. It is not

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22/ The person who is aggrieved by employment discrimination is directed to the local agency as a first resort. He is without an attorney and not prepared to initiate an action in federal court.

clear, for example, whether mere filing of the Section 1981 suit prior to the final determination of the state agency is sufficient or indeed what is the final determination.[23/] Is the plaintiff to be relegated to either (1) meeting a deadline for pro forma filing to bar res judicata or (2) "Bailing out at the appropriate stage, i.e. abandoning state procedures before she has incurred a sufficiently final decision to warrant imposition of res judicta?[24/]

The simple expedient for future aggrieved parties would be to file a suit under Section 1981 as a defensive measure. This would have the effect of fostering a proiferating of pending actions in federal courts.

E. The Federal Courts Should be the Fact-finder When Federal Rights are Involved.

In addition to the foregoing, the reasoning of district court is not complete because it fails to address

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23/ The following example illustrates the problem. The Section 1981 suit could be filed on February 1 and the state decision rendered on February 2. Is that sufficient to eliminate the bar? The other alternative would be to require the completion of the Section 1981 suit prior to the decision of the state agency. The result would then depend on the speed of one forum compared to the other unless one forum suspended proceedings.

24/ The plaintiff took the instant case to the Appellate Division. Would the result be the same if she had stopped after the Appeal Board? Or after the State Division? Does the imposition of the res judicata sanction depend on how far the state proceedings are utilized?

the possibility of a favorable determination by the state agency. While the Court may have felt justified since the plaintiff ostensibly has some choice, surely the court would not deny that if principles of res judicata should apply to an adverse holding with respect to a plaintiff they should apply similarly to a favorable one. The same parties and the same issues would be involved. The same considerations for estoppel would be present. In this regard, however, it should be noted that an agency determination will not bind defendants in a Title VII action. Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1973). In Batiste, the plaintiffs had received a favorable determination from the Illinois Fair Employment Practices Commission. Relying on the determination of the Commission, the district court granted plaintiffs' motion for summary judgment. The Circuit Court reversed:

> It is evident from the record and the district court's opinion that it merely accepted the ruling of Illinois Fair Employment Practices Commission and it did not attempt to make its own determination. While a defendant can be required to defend again, it cannot be forced to accept the prior findings and the federal court must conduct its own inquiry. (Emphasis added) at 451.

The reasoning is equally applicable in a Section 1981 context.[25/]

CONCLUSION

Congress has evinced an "intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." (emphasis added) Alexander, supra, at 48. The holding of the district court is contrary to this manifest intention since it means (1) the ability to pursue a Section 1981 action is dependent upon prior action consistent with Title VII and (2) an individual elects to proceed via Title VII or Section 1981 when he decides whether he shall use administrative procedures.

The State agencies are a valuable resource for the

25/ The informal procedures utilized by these agencies dictate that the federal courts remain the ultimate decision-makers on questions of discrimination.

> "Indeed it is the informality of arbitral procedures that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." Alexander v. Gardner-Denver, 415 U.S. at 58.

discriminatee. They provide a ready-made mechanism for disposing of a complaint. They possess expertise and experience which uniquely qualify them for their role as the initial (in most cases) touchstone for an aggrieved individual. However, when important federal rights are involved, as in the instant case, the individual must be given an opportunity to discover and prove his case on the merits.[26/] Plaintiff here is asking only for such an opportunity before the district court.

The decision of the district court should be reversed and this action remanded for a trial on the merits.

Respectfully submitted,

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Attorneys for Appellant

26/ Appellant's position is aptly summarized by the Supreme Court's observation in England v. Louisiana State Board of Medical Examiners, supra, footnote 20:

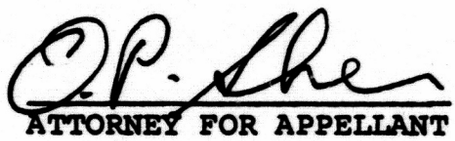
> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. 375 U.S. at 416.

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have this 30th day of September, 1976, mailed a copy of the foregoing BRIEF FOR APPELLANT upon counsel for Appellees:

Howard L. Ganz
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

by placing same in the United States mail, adequate postage prepaid.



ATTORNEY FOR APPELLANT